

December 9, 2004

VIA E-MAIL AND CERTIFIED MAIL

President's Committee for Purchase From People
Who Are Blind or Severely Disabled
1421 Jefferson Davis Highway
Jefferson Plaza 2, Suite 10800
Arlington, VA 22202-3259
Attn: Mr. John Heyer

Dear Mr. Heyer,

**RE: Comments to the Proposed Rules Regarding the Javits-Wagner-O'Day
Program, (Docket No. 2004-01-01)**

Goodwill Industries International, Inc. ("GII") is a network of 166 community-based, autonomous nonprofit organizations serving approximately 616,000 people with workplace disadvantages and disabilities by providing job training and employment services at locations in the United States. Of the total number served, some 6,408 people were employed as a result of JWOD programs. Approximately 77 of our members are participating vendors under the Javits-Wagner-O'Day Act (41 U.S.C. 46-48 C) ("JWOD Act"), and will be negatively impacted in their ability to serve people with disabilities should the proposed regulations become final. We appreciate the opportunity to provide our comments to the President's Committee for Purchase From People Who Are Blind or Severely Disabled ("Committee").

Citing recent public concerns regarding isolated instances of excessive compensation for non-profit executives, a perceived lack of financial public disclosure, and the lack of formal guidelines for Board independence for JWOD-affiliated agencies, the Committee has proposed new rules that would restrict participation in the JWOD vendor program to organizations that agree to abide by restrictions on their internal governance practices in these areas.

GII shares the Committee's concern about any organization that abuses its nonprofit status or engages in mismanagement to the detriment of the people it serves or the public. However, we disagree that the proposed rules, which will impact the entire community of participating non-profit agencies, are the proper mechanism to effect such change, especially in light of the Committee's own comment that the overwhelming majority of JWOD-affiliates central nonprofit agencies and nonprofit agencies operate in an ethical and accountable manner.

More importantly, a review of the JWOD statute, regulations implementing JWOD, the legislative history of the JWOD Act and federal case law cause us to conclude that the Committee does not have the authority to impose regulations regarding corporate governance and executive compensation under the JWOD Act in its present form, nor can it amend the Act to promulgate such rules.

Other Regulatory Systems Adequately Protect Citizens With Blindness and Disabilities And The Public Interest

We have difficulty understanding why the Committee would attempt to assume regulatory authority over the governance standards for nonprofit, 501(c)(3) organizations when numerous other governmental agencies already regulate them. Congress, through the Senate Finance Committee, is scrutinizing the issue of governance standards of nonprofits. Primary oversight over a wide range of financial and governance affairs, including executive compensation, resides with the Internal Revenue Service ("IRS"). IRS is empowered to impose intermediate sanctions on nonprofits not in compliance. Each 501(c)(3) organization must annually file a Form 990, which discloses to the public its finances, including administrative expenses and executive compensation. The IRS restricts "private benefit" and related concerns. Nonprofit vendors under the JWOD program will be subject to the same standards developed for other nonprofits. Additionally, nonprofits are organized under state law. The Attorneys General and consumer protection agencies of most states enforce abuses of charitable trusts and activities. Such additional oversight by the Committee is duplicative and serves no added purpose, in our view, other than to impose arbitrary and counterproductive restrictions on the ability of many nonprofit organizations to sell their products and services to the federal government.

Limitations on Committee Authority to Regulate Nonprofit Internal Management

Section 2 of the JWOD Act (41 U.S.C. § 47) sets forth the express powers and duties Congress vested in the Committee, summarized as follows:

- Establishment of procurement list for publication in the Federal Register of commodities and services produced by a qualified nonprofit agency for the blind or severely handicapped;
- Determine fair market price of commodities and services contained on procurement list with the power to revise the price from time to time;
- Designate central non-profit agency or agencies to facilitate distribution of orders of the Government for commodities and services on the procurement list among qualified nonprofit agencies for the blind and severely handicapped;

- Make rules and regulations regarding specifications for commodities and services on the procurement list, the time of their delivery, and such other matters as may be necessary to carry out the purposes of this Act;
- Make continuing study and evaluation of its activities to assure effective and efficient administration of this Act; and
- The Committee may prescribe regulations regarding the priority in the purchase by the Government of commodities and services offered for sale by qualified nonprofit agencies for the blind and severely handicapped.

Each of these powers and duties directly advances the overall stated purpose of the JWOD Act: “to increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of commodities and services from qualified nonprofit agencies employing persons who are blind or have other severe disabilities...” See 41 C.F.R. § 51-1.1(a).

By contrast, the Committee’s proposal to expand its powers and duties to regulate the internal governance and executive compensation of participating nonprofit organizations does not, on its face, directly advance the public policy goals Congress articulated in the JWOD Act. The Committee has not established an evidentiary record to make any such demonstration. Without a clear demonstration of how these new restrictions on nonprofit governance directly increase employment and training opportunities for blind and disabled citizens and augment a market for their services, the proposed rules clearly exceed the Committee’s Congressional mandate.

In fact, GII believes that the proposed rules may, contrary to Congress’ goals, impede employment, training and market opportunities for many citizens who are blind and disabled. Our experience over several decades is that successful nonprofit agencies grow both in revenues and in people served and employed. Many become quite large, requiring significant managerial expertise if they are to operate efficiently in an often unpredictable market for charitable services and commodities. Were all nonprofit organizations restricted to the managerial compensation levels specified in the proposed rules, many would be unable to attract and retain the most experienced and talented personnel, particularly in high-cost-of-living metropolitan areas. The resulting loss of talent and “brain drain” would reduce employment and training opportunities for blind and disabled citizens. The soundness of this conclusion is based on over a hundred years of corporate management theory. As a practical matter, we are aware that many smaller agencies have merged with larger organizations, causing their budgets to expand significantly. Management of such organizations, with increased budget and personnel, requires a high level of skill. Salary paid is certainly a factor in attraction and retention of highly skilled employees for this purpose. In addition, for many larger organizations, only a small portion of the overall budget is a result of JWOD-affiliated work.

The Committee may claim that authority to regulate nonprofit governance practices is based upon language in the JWOD Act granting the power to “make rules and regulations

regarding...such other matters as may be necessary to carry out the purposes of this Act.” 41 U.S.C. §47(d)(1)(C). Or the Committee may claim its power is implicit in Congress’ definition of “qualified nonprofit agency” which includes those agencies “operated in the interest of blind individuals [or] severely handicapped individuals.” 41 U.S.C. § 48b(3) & (4). Although these statutory provisions may appear, at first blush, to grant the Committee broad authority to carry out the purposes of the Act, in fact, this ability is restricted to rules that are “*necessary*” to achieve the Act’s central purpose, namely to increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of commodities and services from nonprofit agencies employing persons who are blind or have other severe disabilities. Because the Committee is unable to demonstrate a direct and logical connection between the new regulations and the Act’s stated purpose, the new rules lack the required legal authority.

JWOD’s Legislative History Does Not Support Regulation of Nonprofit Internal Management

The JWOD Act’s legislative history provides additional guidance indicating that Congress intended the Committee to serve an administrative role over the procurement system as it relates to products and services provided by blind and disabled citizens, rather than to regulate the charitable nonprofit sector. The Committee was first established in 1938 for the stated purposes of establishing fair prices and to distribute orders among the various agencies. Authority was granted by Congress to:

Make such rules and regulations regarding specifications, time of delivery, authorization of a central nonprofit making agency to facilitate the distribution of orders among the agencies for the blind, and other relevant matters of procedure as shall be necessary to carry out the purposes of the JWOD Act.

Thus, from its inception, the Committee’s powers and duties were narrowly tailored to establishing a public market for goods and services provided by the blind and disabled. It was never to supplant the Internal Revenue Service in determining the operational qualifications necessary to qualify for and maintain a tax-exempt status. Nowhere in the legislative history is there support for this procurement Committee to regulate the day-to-day workings of the participating agencies in complicated matters such as nonprofit trusteeship and executive compensation. Nor is there any suggestion in the legislative history that Congress ever thought the Committee should preempt state Attorneys General and consumer protection agencies in assessing the bona fides of hundreds of nonprofit organizations. To the contrary, it would appear that the Committee was limited to assessing the fair market value for such organizations’ goods and services, whether they employed blind or disabled individuals for 75 percent of the man-hours devoted to produce those goods or services, and whether the mission and operation of such organizations was devoted to the interest of blind and disabled citizens – but not to micromanage their governance affairs. See 41 U.S.C. §§ 47(a)(1)(b) (determine fair market prices), 48b(3)(A) & (4)(A) (operated in the interest of blind and disabled individuals), and 48b(3)(C) & (4)(C) (75 percent of man-hours by blind and disabled individuals).

Had Congress intended that compensation and governance were matters necessary to carry out the purposes of the JWOD Act, it could easily have added those powers in 1971 when it amended the Act to include the powers and duties as stated in the current JWOD Act. Instead, Congress chose to specifically articulate the circumstances under which the Committee could promulgate regulations as the priority to be given to commodities produced or offered for sale by nonprofit agencies for the blind or other severely handicapped. The Committee was also authorized to promulgate rules regarding the ability to make a continuing study and evaluation of the Committee's activities under the Act to ensure effective and efficient administration of the Act. None of the enumerated powers and responsibilities granted the Committee the authority to promulgate rules regarding corporate governance and executive compensation as the JWOD Act was established and amended.¹

Finally, both the implementing regulations and the JWOD Act set forth the same definitions as to what factors constitute a "qualified nonprofit agency". 41 C.F.R. Section 51-4; see also 41 U.S.C. Section 48b(3) and (4) (defining "qualified nonprofit for the blind" and "qualified nonprofit for the severely handicapped"). By adding executive compensation and governance as additional elements, which are outside the scope of the definition provided in the JWOD Act, the Committee erodes and significantly reduces the number of otherwise highly effective agencies that would qualify. We do not find any authority granted to the Committee that would allow such an expansion of the current definition of a "qualified nonprofit agency". See Nat'l Retired Teachers Ass'n v. United States Postal Serv., 430 F.Supp.141, 145 (D.D.C. 1977) ("It is well-settled that a regulation which exceeds Congressional authorization is invalid") (citing Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue, 297 U.S. 129, 134 (1936)).

The Committee's Proposed Regulations on Nonprofit Organizations May Violate Profound Equal Protection Principles


The proposed rules raise significant Constitutional concerns. Both nonprofit and for-profit agencies regularly compete for government contracts. Nonprofits compete against companies as large as Lockheed Martin and Boeing. We have not found other circumstances where the ability to participate in government contracting is contingent upon a certain corporate governance structure of the participating vendor. Similarly, there is not an inquiry into the executive compensation level of the participating agency versus that of the highest paid SES, career Federal government employee for vendors to

¹ We believe the proposed rules exceed the Congressional mandate under the JWOD Act. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). "It remains a fundamental principle of administrative law that agencies may not self-levitate their power to promulgate regulations- they must rather find any such power in a source conferred by Congress." *Respect Incorporated v Committee on the Status of Women*, 815 F. Supp. 1113, 1123 (N.D. Ill. 1993). "Though an agency may promulgate rules or regulations pursuant to authority granted by Congress, no such rule or regulation can confer on the agency any greater authority than that conferred under the governing statute." *Killip v. Office of Personnel Management*, 991 F.2d 1564, 1569 (Fed. Cir. 1993)

be permitted to compete for government contracting opportunities. If the proposed rules were to become final, however, only nonprofit agencies desiring to participate in the JWOD program would be subject to this unique level of regulation. Similarly, in the event compensation paid to participating nonprofit vendors' executives were to exceed the amount stated in the proposed regulation, only these nonprofit organizations would be required to breach their contractual obligations as set forth in the executives' employment contracts in order to reduce the level of compensation commensurate with the proposed rules. There is no rationale for such disparate treatment of nonprofit organizations desiring to participate in the JWOD program and no precedent for establishing a cap on executive compensation or imposing governance rules as a prerequisite to participation in government contracting.

For the reasons stated herein, we believe the proposed rules exceed the authority of the Committee, may reduce opportunities for blind and disabled citizens, and should be withdrawn.

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DATE: 12/9/04

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